WASHINGTON ENVIRONMENTAL COUNCIL

April 28, 1997

The Honorable Gary Locke
Governor, State of Washington
PO Box 40002
Olympia, WA 98504-0002

Subject: E2SHB 1866

Dear Governor Locke:

The Washington Environmental Council requests that you veto E2SHB 1866.

E2SHB 1866 is based loosely on the EPA's experimental project XL. While the EPA program is an experiment, this bill pre-supposes that an XL-type program is the answer and changes Washington's environmental laws. In March of this year EPA reversed its plan to allow states to use similar flexibility. Rather than jumping to the conclusion that this is the answer for Washington, we should carefully review the situation and determine first, is there a problem and then, second, how best to address the problem while maintaining strong environmental and public health protection.

We believe that E2SHB 1866 is flawed at the outset. The definition of environmental excellence includes both better environmental results or cheaper operating costs. The public and environment are being asked to accept the risk of industry's experiments with new technology. The return should be improved environmental quality -- not just cheaper environmental controls. Moreover, as discussed below, the bill essentially removes longstanding rights of citizen oversight and review and substitutes a poorly defined "stakeholder" process with no real authority.

Three sections of this bill are particularly egregious and warrant the bill's veto:

1. Section 10 needlessly replaces existing law concerning review of environmental decisions. Currently, all permit or license decisions, such as approval of a program agreement under this bill, are subject to review before the Pollution Control Hearings Board where a factual case may be developed. Appeal before the PCHB provides all parties with the fundamental right of

cross-examination of witnesses for Ecology and the permit proponent. Judicial review of PCHB decisions are based on the factual "substantial evidence" test. This process had already been streamlined through other regulatory reform efforts. There is simply no reason to eliminate this method of appellate review.

Section 10, however, supplants the PCHB process and limits judicial review to the agency's record and a very high "arbitrary and capricious" standard of review. Section 10 deprives citizens of their right to carefully review and question these agreements. Section 10 essentially eliminates the right of confrontation and cross-examination. Considering the experimental basis of these program agreements it only make sense that full appellate review be maintained.

2. Section 15 of the bill exempts the entire program agreement process from review under the State Environmental Policy Act. The SEPA process provides a carefully laid out program of public and agency input, review and documentation -- leading ultimately to an informed decision. Like Section 10, Section 15 attempts to limit long standing laws allowing careful citizen review. Why are the opponents afraid of public review and input? If these programs are supposedly going to provide "environmental excellence" they should be subject to review under SEPA. Please remember that providing SEPA review does not mandate that a "full EIS" will be required in each case. Only when program agreements reach the level of creating significant impacts to the environment will additional review be necessary. By eliminating SEPA review, the Legislature is mandating decisionmaking by default -- quite to the contrary of SEPA's purpose to review all decisions through careful deliberation.

3. Section 31 of the bill improperly overrides Washington's strong protection of water quality. Washington has long protected and mandated that our waters be of high quality. RCW 90.54.020(3)(b) prohibits the discharge of pollutants if they will result in a reduction in existing water quality. This bill undoes that protection by amending our water quality laws to exempt facilities operating under a program agreement from compliance with RCW 90.54.020(3)(2). In other words, if a company is operating under a program agreement it is free to degrade existing water quality. This is not acceptable. There is simply no excuse for allowing the discharge of pollutants into water that will change the existing water quality.

Section 31 is perhaps the most revealing section for showing the proponents' intent -- to relax Washington's longstanding protections over its air and water quality.

In addition, numerous other provisions also support this bill's veto:

For example, the "stakeholder" process is poorly defined and virtually meaningless. While stakeholders are brought in and provided "an opportunity for discussion" there is no opportunity for the stakeholders to object to or prevent an agreement. The stakeholders are not provided any authority other than to listen to the proponent's pitch. A true stakeholder has input and a say in the outcome. Moreover, the stakeholders are left on their own to find the resources to meaningfully participate.

Further, Section 11(4) of the bill leaves a major gap in Ecology's ability to protect public health and the environment -- even when it knows there is endangerment. In the event Ecology determines that the public health or environment is endangered it has the authority to revoke the permit and implement interim, more protective, standards. **These standards, however, are subject to judicial review and may not be enforced until after all opportunities for judicial review are complete. This may take a year or more.** In other words, once Ecology determines that an endangerment exists it may not be possible to invoke more protective standards until one of our already overcrowded superior courts has reviewed the criteria. This is unacceptable.

While the Washington Environmental Council remains intrigued with the idea that an experimental program could be designed to allow innovative technologies that result in superior environmental quality, this bill contains far too many flaws and does not meet the true goal of creating "environmental excellence." Rather than a thoughtful, deliberate approach, this bill was rushed through this year's legislature. We believe that prior to undoing 20 years of environmental protection, the people of the state deserve a careful deliberative review.

The Washington Environmental Council strongly encourages you to veto this bill and establish instead an interim consensus study commission to review and possibly propose an alternative approach.

Thank you for the opportunity to present these comments.

Very truly yours,

WASHINGTON ENVIRONMENTAL COUNCIL

David S. Mann
President

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